90-1748

NO. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

JERRY R. WILLIAMS, PETITIONER,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

In *Spies v. United States*, 317 U.S. 492 (1943), this Court held that the mere failure to file an income tax return or pay a tax, however willful and intentional, only constitutes the misdemeanor crime of failure to file a return, and to elevate that crime into the felony of attempted tax evasion, there also must be some additional affirmative act constituting an attempt. The question presented here is whether an individual's failure to withdraw or amend a Form W–4, on file with his employer, constitutes an affirmative act under *Spies* which could elevate a failure to file a tax return into the felony of attempted evasion.

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No. _____

JERRY R. WILLIAMS, PETITIONER,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Jerry R. Williams, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on March 27, 1991.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 5a) is reported at 928 F.2d 145. There was no opinion of the district court.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 16a) was entered on March 27, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 7201 of the Internal Revenue Code of 1954 (26 U.S.C.) as amended:

SECTION 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Section 7203 of the Internal Revenue Code of 1954 (26 U.S.C.) as amended:

SECTION 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX.

> Any person required under this title to pay any estimated tax or tax, or required by this title or by

> regulations made under authority thereof to make a return...[1], keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution.

STATEMENT

1. Jerry R. Williams was indicted in a three-count felony indictment, charged under Section 7201 of the Internal Revenue Code of 1954[2] with attempting to evade federal income tax for the years 1983, 1984, and 1985. A copy of the indictment is attached. (App., *infra*, 1a.)

Count I alleged that he attempted to evade his income tax for the year of 1983 by failing to file an income tax return for that year, by failing to pay tax for that year, "and by filing with his employer a false and fraudulent Form W-4,

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[1] A parenthetical phrase, not relevant to this case, was deleted from section 7203, effective for tax years beginning after December 31, 1984. See Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 412(b)(9), 98 Stat. 494 at 792.

[2] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the "Code").

claiming 35 exemptions and later, during the same year, filing a further false Form W-4 to claim 50 exemptions...." (App., *infra*, 2a.)

Counts II and III similarly charged that Williams attempted to evade income tax for years 1984 and 1985 by failing to file returns for those years and pay tax for those years, but those counts did not allege the filing of a false Form W-4. Instead, they alleged that Williams attempted to evade tax for 1984 and 1985, "by maintaining of record with his employer his claim on Form W-4 of 50 exemptions...." (App., *infra*, 2a-3a.)

A Form W-4 is a form filed by an employee with his employer, setting forth a number of "withholding allowances."[3] The number of withholding allowances is used by the employer in determining how much income tax to withhold from the employee's wages. The employee determines the number of withholding allowances to enter on the form, in part, by estimating the amount of deductions, such as interest or business expenses, he anticipates he will incur in the future. See Code Section 3402(f)(1)(D) and (m).

At trial, the Government introduced evidence, and Williams conceded, that he had failed to file income tax

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[3] The withholding allowances on Form W-4 sometimes are referred to as "exemptions," as in the indictment. Withholding allowances based on estimated deductions for business expenses and interest, as are involved here, however, have no relationship to the "personal exemptions" that may be deducted on an income tax return for a taxpayer, his spouse and children. See Code Section 151.

returns since 1972. Williams, who was an insurance executive employed by Great American Reserve Life Insurance Company since 1971, filed with his employer three Forms W–4 in late 1982 and early 1983. The first form claimed 14 withholding allowances, which the Government conceded was correct. The second Form W–4, however, increased Williams' withholding allowances to 35, and the third Form W–4, filed in March of 1983, increased those allowances to 50. The Government introduced evidence that, based on after the fact calculations of Williams' actual taxable income and deductions for each of the three taxable years, the correct number of withholding allowances he would have been entitled to was 21 for 1983, 6 for 1984, and 3 for 1985. The Government asserted that the second and third Forms W–4, therefore, falsely overstated Williams' withholding allowances and that he consequently had attempted to evade his income tax for the years 1983 through 1985. (App., *infra*, 6a–7a; 4 Tr. 38–44.)[4]

Following the close of the Government's case, Williams moved for a judgment of acquittal on Counts II and III on grounds that those counts failed to state a felony offense in that the Government had not alleged in those counts any affirmative act of evasion as required by this Court's holding in *Spies v. United States*, 317 U.S. 492 (1943). The Government took the position that Williams was under an affirmative duty to withdraw or correct the Form W–4 on file with his employer and his failure to do so was an affirmative act under *Spies*, sufficient to establish attempt

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[4]"Tr." references are to the volume and page of the trial transcript.

ed tax evasion. The trial court denied Williams' motion without explanation of its rationale. (4 Tr. 101–107.)

Williams took the stand in his own defense and testified that in the years preceding 1972 he had received tax refunds, and he was entitled to a refund in 1972, and simply failed to file his return for that year. He further testified that "after that it just kind of got away from me," and that he knew he should have filed his returns, but that he never was successful in doing so. (4 Tr. 155–156.)

Williams testified that in 1982 his employer moved him from Dallas to San Antonio and changed his compensation from a straight salary to a commission structure under which, he anticipated, he would incur substantial amounts of deductible business expenses which he had not previously incurred. In addition, Williams purchased a home in San Antonio which would generate substantial interest and real property tax deductions. He consulted with officials of his employer regarding the preparation of a Form W–4, and received a range of figures that other individuals, whom he believed to be in similar situations, had claimed. Based on those estimates, he revised his withholding allowances, raising them first to 35 and then to 50. He testified that he did not intend to leave the allowances at 50 permanently, but rather intended to leave it there temporarily until his commissions began to build up. (4 Tr. 157–177.)

The jury returned a verdict of guilty on all counts. The district court denied Williams' post–trial motions for

acquittal based on the failure of the indictment to allege an offense.

2. The court of appeals affirmed the convictions. That court acknowledged that *Spies v. United States* requires that the felony of attempted tax evasion requires that there be an affirmative act. The court, however, stated that "Williams was under a continuing obligation to correct his [Form W-4]," but "[h]e failed to do so." It concluded, therefore, that "maintaining on file the March 17, 1983 W-4 thus constituted an act 'the likely effect of which would be to mislead or conceal,'" quoting *Spies v. United States*, *supra* at 499.[5] (App., *infra*, 13a.)

REASONS FOR GRANTING THE PETITION

The court of appeals' decision undermines this Court's holding in *Spies v. United States*, *supra*. In *Spies*, this Court recognized that the failure to file a tax return may be a lesser included offense with respect to the felony of attempted tax evasion and held that "the difference between the two offenses ... is found in the affirmative action implied from the term 'attempt,' as used in the felony subsection." *Id.* at 498. For a failure to file a tax return or pay a tax to constitute a felony, there must be "some willful commission in addition to the willful omissions that make up the list of misdemeanors. Willful but passive neglect of the statutory duty [to file

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[5]Because the court rejected Williams' argument that Counts II and III were legally defective, it did not reach his contention that erroneous jury instructions involving those counts also tainted his conviction on Count I.

a return or pay a tax]" may constitute a misdemeanor, but not the felony of attempted tax evasion. *Id.* at 499.

An indictment which charges attempted tax evasion by alleged means which, in fact, are mere omissions or failures to act, is defective and cannot support a conviction under Code Section 7201.[6] *Clay v. United States*, 218 F.2d 483 (5th Cir. 1955). Here, Counts II and III -- which must stand on their own for this purpose as if Count I were not included in the indictment (see *Dunn v. United States*, 284 U.S. 390, 393 (1932); *United States v. Huff*, 512 F.2d 66, 69 (5th Cir. 1975)) -- allege no affirmative acts. Instead, those counts simply charge that Williams attempted to evade tax for years 1984 and 1985 by failing to file tax returns for those years, by failing to pay tax for those years, "and by maintaining of record with his employer his claim on Form W-4 of 50 exemptions...." "[M]aintaining of record with his employer" a Form W-4, however, is not in any sense a commission. Williams did nothing affirmative whatsoever to "maintain" that form on file, and there is no "act" to which the Government can point. Rather, the Government here complains of a pure omission; that Williams failed to withdraw or to amend a form.[7] Counts II and III thus contain only allegations of omissions, but not a single allegation of any com-

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[6]Williams' contention thus is that the indictment is defective. The court of appeals mistakenly stated that Williams contended that "the elements of the felony offense *were not proven*." (App., *infra*, 5a; emphasis supplied.)

[7] In fact, Counts II and III do not even allege that the Form W-4 on file was false, just that it claimed 50 allowances.

mission, as the Government in effect recognizes elsewhere. See U.S. Department of Justice, Tax Division, *Criminal Tax Manual* (6th ed. 1985) 8–4 ("failing to act or do something does not constitute an attempt [under Section 7201].")

The Government could easily have charged Williams in a manner that would have alleged a felony. For example, it could have charged in Counts II and III that he attempted to evade tax by *filing* a false Form W–4 *in 1983* and, as part of a plan, failing to file his tax returns in the following years.[8] The Government routinely prosecutes similar cases in that manner. See, *e.g.*, *United States v. Waldeck*, 909 F.2d 555, 557, 560 (1st Cir. 1990) ("Courts have uniformly held that *the filing* of false W–4s constitutes evidence of a willful attempt to evade taxes..."; emphasis supplied); *United States v. Copeland*, 786 F.2d 768, 770–771 & n.3 (7th Cir. 1986). Indeed, the Fifth Circuit here seems to have assumed that Williams' failures to file returns were an integral part of an affirmative plan set into motion in an earlier year (App., *infra*, 11a), but that court ignored the fact that Counts II and III include no such allegations. Those counts allege *only* that

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[8] Had the Government so charged Williams, however, it would have had to show that when he filed the Form W–4 in 1983 he then intended it as an attempt to evade his 1983, 1984, and 1985 taxes. That would have been difficult to prove since in 1983 Williams obviously could not know the amount of withholding allowances he would be entitled to in subsequent years. In contrast, by not charging an affirmative act intended to evade tax as required by *Spies*, the Government could imply guilt by focusing simply on Williams' continuing duty to correct the Form W–4 on file and the growing disparity between the amount of withholding allowances reflected in that form (50) and the number to which he was currently "entitled," *i.e.*, 6 in 1984 and 3 in 1985.

Williams failed to take certain actions, and consequently do not state the felony crime.

Section 7201 of the Internal Revenue Code is the "capstone" of the hierarchy of the tax crimes in the Internal Revenue laws. *Spies*, *supra*, at 497. However, the Fifth Circuit's opinion -- which it expressly recognizes is "*res nova* at the appellate level" (App., *infra*, 11a n.2) -- threatens to replace that hierarchy with an autocracy under which virtually any tax crime could be prosecuted as a felony violation of section 7201. Under the indictment approved here by the court of appeals, any employee who fails to file a return could be convicted of attempted evasion of tax, even if he originally filed a *correct* Form W-4, if through changed financial circumstances that form is no longer correct, and if the employee is aware of his obligation to correct that form. Indeed, under this rationale, the intentional failure to file a tax return or pay a tax *by itself* could constitute the felony of attempted tax evasion, since one also is under an affirmative duty imposed by law to file the return, supply information, or pay the tax, just as one is under a "affirmative duty" to correct a Form W-4 on file. The Fifth Circuit's opinion thus undermines this Court's distinction in *Spies* between attempted evasion of tax and failure to file a tax return, and makes any simple failure to file a return or pay a tax potentially punishable as a felony, contrary to Congress' intent in Code Section 7203.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

May 1991

APPENDIX A

UNITED STATE DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA,	)	CRIMINAL NO. SA89CR336
	)	
Plaintiff,	)	**INDICTMENT**
v.	)	
	)	[Vio: 26 U.S.C. § 7201:
JERRY R. WILLIAMS,	)	Income Tax Evasion]
	)	
Defendant.	)	

THE GRAND JURY CHARGES:

COUNT ONE
[26 U.S.C § 7201]

That during the calendar year 1983, Defendant,

JERRY R. WILLIAMS,

a resident of the San Antonio Division of the Western District of Texas, had and received taxable income in the sum of $21,861.63, which amount was his one-half community property interest in his total income; that upon said taxable income, there was owing to the United States of America an income tax of $2,080.26; that well knowing and believing the foregoing facts, Defendant Jerry R. Williams on or about April 15, 1984, in the Western District of Texas, did willfully attempt to evade and defeat the said income tax due and

owing by him to the United States of America for said calendar year by failing to make an income tax return on or before April 15, 1984, as required by law, to any proper officer of the Internal Revenue Service, by failing to pay to the Internal Revenue Service said income tax in full and by filing with his employer a false and fraudulent Form W-4, claiming 35 exemptions and later, during the same year, filing a further false Form W-4 to claim 50 exemptions, in violation of Title 26, United States Code, Section 7201.

COUNT TWO

[26 U.S.C. § 7201]

That during the calendar year 1984, Defendant,

JERRY R. WILLIAMS,

a resident of the San Antonio Division of the Western District of Texas, had and received taxable income in the sum of $27,543.14, which amount was his one-half community property interest in his total income; that upon said taxable income, there was owing to the United States of America an income tax of $6,035.41; that well knowing and believing the foregoing facts, Defendant Jerry R. Williams on or about April 16, 1985, in the Western District of Texas, did willfully attempt to evade and defeat the said income tax due and owing by him to the United States of America for said calendar year by failing to make an income tax return on or before April 16, 1984, as required by law, to any proper officer of the Internal Revenue Service, by failing to pay to the Internal Revenue Service said income tax in full and by

maintaining of record with his employer his claim on Form W–4 of 50 exemptions, in violation of Title 26, United States Code, Section 7201.

COUNT THREE
[26 U.S.C. § 7201]

That during the calendar year 1985, Defendant,

JERRY R. WILLIAMS,

a resident of the San Antonio Division of the Western District of Texas, had and received taxable income in the sum of $33,380.52, which amount was his one–half community property interest in his total income; that upon said taxable income, there was owing to the United States of America an income tax of $5,747.69; that well knowing and believing the foregoing facts, Defendant Jerry R. Williams on or about April 15, 1986, in the Western District of Texas, did willfully attempt to evade and defeat the said income tax due and owing by him to the United States of America for said calendar year by failing to make an income tax return on or before April 15, 1986, as required by law, to any proper officer of the Internal Revenue Service, by failing to pay to the Internal Revenue Service said income tax in full and by maintaining of record with his employer his claim on Form W–4 of 50 exemptions, in violation of Title 26, United States Code, Section 7201.

A TRUE BILL

/S/
FOREPERSON

RONALD F. EDERER
United States Attorney

By: WAYNE F. SPECK
Assistant United States Attorney
Senior Litigation Counsel

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 90-5569

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
JERRY R. WILLIAMS,
Defendant-Appellant.

Appeal from the United States
District Court
for the Western District of Texas

(March 27, 1991)

Before RUBIN, POLITZ, and DUHE, Circuit Judges.

POLITZ, Circuit Judge:

Convicted of three felony counts of attempting to evade federal income taxes, 26 U.S.C. § 7201, arising out of his failure to file returns for the years 1983, 1984, and 1985, Jerry R. Williams appeals, contending that the elements of the felony offense were not proven and that the charge in one count was untimely. Finding no error, we affirm.

Background

While employed by the Great American Reserve Life Insurance Company (GARCO), from 1971 through late 1982 Williams maintained on file a W–4 form claiming one personal exemption. Taxes were deducted by his employer but Williams filed no federal income tax returns. In 1982 Williams was promoted and transferred to San Antonio. Anticipating more deductions from increased business expenses and the purchase of a home, in October 1982 he filed a new W–4 claiming 14 exemptions. On March 17, 1983, Williams again revised his W–4 filing, this time submitting a form claiming 50 exemptions. He explained the massive exemption increase in an accompanying note to GARCO's accounting office which read: "I'm going to have to increase my exemption to 50 for a few months. I've got to survive the tax bite until my o/w build up." The "o/w" referred to "overwrites," the payments Williams received based on insurance written by subordinate agents. The "survival period" was extensive. Because of the claimed exemptions, for nearly three years GARCO withheld only negligible amounts, considering Williams' earnings, ranging from just over $1,200 on compensation exceeding $61,000 to $5,455 on earnings exceeding $74,600.

In December 1986 Williams' tax–savings gambit came to an end. A revenue officer went to Williams' office and told him that the IRS had information that he had not filed income tax returns for the prior six years. Asked to confirm or deny, Williams lied, claiming that he had filed the requisite returns and offering to produce copies at a later

meeting. Williams conceded, however, that he probably owed taxes beyond the amount paid. A second meeting was scheduled for the following month in the IRS office. During that meeting Williams admitted that he had lied earlier and acknowledged that he had not filed a tax return since 1971. Williams produced W-2 forms for the years 1979, 1980, 1983, 1984, and 1985.

Williams was indicted on December 6, 1989 for three felony counts of attempting to evade federal income tax by failing to file tax returns for the years 1983, 1984, and 1985, failing to pay the tax due, and submitting a false and fraudulent Form W-4 to his employer and maintaining it on file during the indictment period. Williams was convicted on all counts and was sentenced to two concurrent three-year periods of incarceration, an additional suspended three-year term, five years probation, and a fine of $10,000. As a condition of probation Williams must pay all taxes, interest, and penalties due. He timely appealed.

Analysis

Williams first contends that his convictions on Counts Two and Three for attempting to evade taxes for tax years 1984 and 1985 should be reversed because the indictment failed to allege a necessary element of the crime charged. Relying heavily on his interpretation of *Spies v. United States*, 317 U.S. 492, 63 S.Ct. 364, 87 L.Ed. 418 (1943), and this court's holding in *Clay v. United States*, 218 F.2d 483 (5th Cir. 1955), Williams argues that the government neither alleged nor proved any affirmative act for those tax years and

therefore he could not properly have been convicted of a felonious attempt to evade tax.

Our analysis begins with the recognition that before one may be convicted of the felony offense charged there must be the requisite proof of a specific intent of the accused to defeat or evade the payment of the subject tax. *United States v. Nelson*, 791 F.2d 336 (5th Cir. 1986). *Spies v. United States* is the Supreme Court's seminal case distinguishing between the misdemeanor of willful failure to file, 26 U.S.C. § 7203, and the felony of attempting to evade or defeat tax under section 7201. Both crimes are based on similar provisions in the Internal Revenue Code,[1] and both

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[1] **§ 7201 Attempt to evade or defeat tax.**

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties imposed by law, be guilty of a felony and upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

§ 7203 Willful failure to file return, supply information, or pay tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 . . . or imprisoned not more than 1 year, or both, together with the costs of prosecution. . . .

(continued...)

require willfulness, *Sansone v. United States*, 380 U.S. 343, 85 S.Ct. 1004, 13 L.Ed.2d 882 (1965), but, as Justice Jackson wrote in *Spies*:

> The difference between the two offenses, it seems to us, is found in the affirmative action implied from the term "attempt," as used in the felony subsection. It is not necessary to involve this subject with the complexities of the common-law "attempt." The attempt made criminal by this statute does not consist of conduct that would culminate in a more serious crime but for some impossibility of completion or interruption or frustration. This is an independent crime, complete in its most serious form when the attempt is complete, and nothing is added to its criminality by success or consummation, as would be the case, say, of attempted murder. Although the attempt succeed in evading tax, there is no criminal offense of that kind, and the prosecution can be only for the attempt. We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues, Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors. Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony.

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[1](...continued)

For our purposes, the statutory language construed by *Spies* is identical to the version currently in force. *Nelson*, 791 F.2d at 337 n.1.

317 U.S. at 498–99, 63 S.Ct. at 368, 87 L.Ed. at 423 (footnote omitted). The Court, noting congressional use of the term "in any manner," provided an illustrative, non-exhaustive list of incidents upon which an inference of affirmative willful attempt could be predicated, including keeping false or double books, false invoicing, destruction of records, concealment of assets, and "any conduct, the likely effect of which would be to mislead or to conceal." *Id.* at 499, 63 S.Ct. at 368, 87 L.Ed. at 423.

The *Clay* case, which Williams vigorously insists is both squarely on point and completely supportive of his position, is, in fact, neither. Will Clay and three other men were convicted of willfully attempting to evade a tax imposed on persons engaged in the business of accepting wagers. The indictment alleged only "that appellants were engaged in the business of accepting wagers without having paid the occupational tax." We applied the *Spies* analysis and arrived at the inexorable conclusion that the convictions could not stand because no affirmative act had been alleged, only a willful failure to pay the tax. 218 F.2d at 486. Absent an allegation of an affirmative act to mislead or conceal a felony fax evasion indictment is defective.

The convictions at bar are based on charges of more than the owing and mere failure to pay taxes. The counts of the indictment for the years 1984 and 1985 charge that Williams had a specific amount of income upon which a specific amount of tax was due, facts known to Williams, and that he willfully attempted to evade and defeat the tax by failing to make an income tax return by the required date, by

failing to pay the tax due, and by "maintaining of record with his employer his claim on Form W–4 of 50 exemptions." Williams insists that the mere maintenance of the fraudulent W–4 is only an omission, not the commission of an act, and he is therefore accountable only for the misdemeanor offense of failure to file.[2] *See United States v. Masat*, 896 F.2d 88 (5th Cir. 1990). We are not persuaded by this semantic legerdemain.

Williams concedes that the filing of the fraudulent W–4 form claiming 50 exemptions on March 17, 1983 was an affirmative act for that tax year. He maintains, however, that the government must prove either a new affirmative act in 1984 and 1985 or that he intended in March of 1983 that the fraudulent form would carry forward to later years. This argument blithely overlooks the continuing nature of the W–4 form he filed and his obligation to correct intentional misrepresentations of facts.

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[2] The precise issue presented on this appeal appears to be *res nova* at the appellate level. Positions similar to that advanced by Williams have been rejected. *See United States v. Copeland*, 786 F.2d 768, 770 (7th Cir. 1985) (false W–4 form was filed during first tax year charged and during the year after the second tax year charged: "Where a taxpayer has willfully failed to file a tax return in violation of § 7203, a prior, concomitant or subsequent false statement may elevate the § 7203 misdemeanor to the level of a § 7201 felony.") (citing *United States v. Goodyear*, 649 F.2d 226, 228 (4th Cir. 1981); *United States v. Crocker*, 753 F.Supp. 1209 (D.Del. 1991).

The W–4 form Williams completed in March 1983 contained the following instructions:[3]

> Your Form W–4 remains in effect until you change it or, if you entered "EXEMPT" on line 6b above, until February 15 of next year.
>
> * * *
>
> If the number of withholding allowances you are entitled to claim decreases to less than you are now claiming, you must file a new W–4 with your employer within 10 days.
>
> * * *
>
> You may be fined $500 if you file, with no reasonable basis, a W–4 that results in less tax being withheld than is properly allowable. In addition, criminal penalties apply for willfully supplying false or fraudulent information or failing to supply information requiring an increase in withholding.
>
> Your employer must send to IRS any W–4 claiming more than 14 withholding allowances or claiming exemption from withholding if the wages are expected to usually exceed $200 a week. The

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[3] Form W–4 (Rev. 1–83) has a detachable portion with a withholding worksheet which the taxpayer is instructed to detach and keep for his records. The form which Williams signed, under penalty of perjury, still has the worksheet attached. The quotations above are from the information and instruction portion of that form, which was admitted as an exhibit at trial.

> employer is to complete boxes 7, 8, and 9 only on copies of the W-4 sent to IRS.[4]

By maintaining the false form on file Williams continued to perpetrate his initially-intended misrepresentations which were vitally relevant to the tax issue. There is no doubt that Williams knew the form contained false relevant data and that he intended such precisely to prevent the appropriate withholding of his taxes by his employer. Williams was under a continuing obligation to correct his intentional misrepresentations. He failed to do so. Maintaining on file the March 17, 1983 W-4 thus constituted an act "the likely effect of which was to mislead or conceal." *Cf. United States v. Copeland*, 786 F.2d 768 (7th Cir. 1986); *United States v. Crocker*, 753 F.Supp. 1209 (D.Del. 1991). The record thus reflects affirmative acts for tax years 1984 and 1985.

Williams next challenges his conviction on Count One, invoking the six-year statute of limitations which he claims should commence when he filed the fraudulent W-4 in March 1983. If Williams is correct the six-year period had elapsed before his indictment was handed up in December 1989. The government counters that the relevant date for limitations purposes is April 16, 1984, the date on which the 1983 return was due. Whether the period runs

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[4] From the record it is evident that GARCO did not submit the W-4 to the IRS. Whether it failed to do so because of Williams' representation that he was increasing his exemptions for only a short period of time is not before this court.

from the due date of the return, when the defendant has not filed a return, is an issue of first impression for this court.[5]

We conclude that the indictment was filed timely. Williams' offense is the willful failure to file a tax return[6] coupled with an affirmative act to conceal or mislead as to his tax liability. Both elements were proven. Whereas the filing of the fraudulent W-4 was the affirmative act needed to enhance the crime to felony status, the failure to file a return was an essential part of his attempt to evade or defeat

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[5] This issue is distinct from the commencement of the limitations period when a return has been filed, either before or after the deadline. A quarter-century ago we noted:

> In a thoroughly documented opinion which traces the full legislative history of I.R.C. sections 6513 and 6531, the Supreme Court, in a unanimous opinion written by Mr. Justice Fortas, and in effect overruling *Hull [v. United States*, 356 F.2d 919 (5th Cir. 1966)*]*, held that where the return was filed *after* the due date, the Statute of Limitations did not begin to run until the *date of filing*. (That is the date when the alleged crime was committed.) The Court said that when the return is filed *prior* to the due date, the statute begins to run on the due date. *United States v. Habig*, 390 U.S. 222, 88 S.Ct. 926, 19 L.Ed.2d 1055, decided March 5, 1968 (mandate issued April 1, 1968). The decision in *Habig* is now binding upon us and therefore appellant's argument that this action was instituted too late has no merit. *Bursten v. United States*, 395 F.2d 976, 980 (5th Cir. 1968) (emphasis supplied), *cert. denied*, 409 U.S. 843, 93 S.Ct. 44, 34 L.Ed.2d 83 (1972).

[6] There is no question of Williams' willfulness or of his tax deficiency. He conceded as much to the jury; his counsel's opening statement suggested that the jury should convict him of failure to file his returns.

his tax liability. We therefore agree with those courts and commentators who have held or suggested that the limitations period for a prosecution under section 7201 in which no tax return was filed begins to accrue the day the return is due. *E.g.*, *United States v. Ferris*, 807 F.2d 269, 271 (1st Cir. 1986) ("If all that defendant had done was to fail to file his 1977 income tax return, then the last act of evasion would have been April 15, 1978, the date the return and tax were due."), *cert. denied*, 480 U.S. 950, 107 S.Ct. 1613, 94 L.Ed.2d 798 (1987); *United States v. Crocker*, 753 F.Supp. 1209 (D.Del. 1991); *United States v. Sloan*, 704 F.Supp. 880 (N.D.Ind. 1989); *United States v. Sherman*, 426 F.Supp. 85 (S.D.N.Y. 1976); 15 *Mertens Law of Federal Income Taxation* § 55A.21 (1988); Annotation, Start of Limitations Period (26 U.S.C.S. § 6531) Against Prosecution for Attempted Evasion of Taxes Under 26 U.S.C.S. § 7201, 85 A.L.R.Fed. 880, 883 (1987). We express no opinion relative to the effect of affirmative acts occurring subsequent to the filing date.[7]

Williams' 1983 tax return was due to be filed on April 16, 1984. He was indicted on December 6, 1989, within the six-year period of limitations.

The convictions are AFFIRMED.

ATT01C7C:lrb/bbw

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[7] We do not consider whether Williams' subsequent false statements to the revenue agent constituted affirmative acts; no mention of such statements was contained in the indictment.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-5569

D. C. Docket No. CR-89-336-01

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JERRY R. WILLIAMS,

Defendant-Appellant.

Appeal from the United States
District Court
for the Western District of Texas

Before RUBIN, POLITZ, and DUHE, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

March 27, 1991

ISSUED AS MANDATE:

Supreme Court, U.S.
FILED
JUN 21 1991
OFFICE OF THE CLERK

(2)

No. 90-1748

In the Supreme Court of the United States

OCTOBER TERM, 1990

JERRY R. WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an indictment alleging that an employee caused his employer to maintain on file a false Form W-4 charges a willful attempt to evade or defeat tax in violation of 26 U.S.C. 7201.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The decision of the court of appeals, Pet. App. 5a–15a, is reported at 928 F.2d 145.

JURISDICTION

The judgment of the court of appeals, Pet. App. 16a, was entered on March 27, 1991. The petition for a writ of certiorari was filed on May 13, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On December 6, 1989, a grand jury returned a three-count indictment charging petitioner with willfully attempting to evade and defeat income taxes owing for 1983, 1984, and 1985, in violation of 26 U.S.C. 7201. Following a jury trial in the United States District Court

for the Western District of Texas, petitioner was convicted on all three counts. The district court sentenced petitioner to two concurrent three-year terms of imprisonment on Counts 1 and 2, a consecutive suspended three-year term of imprisonment and five years of probation on Count 3, and a $10,000 fine. Pet. App. 7a.

1. Great American Reserve Life Insurance Company (GARCO) employed petitioner as an insurance executive from 1971 through 1985. Until late 1982, petitioner maintained in GARCO's files a Form W-4 claiming one exemption. Although GARCO withheld taxes from petitioner's compensation, petitioner did not file any federal income tax returns. Pet. 5; Pet. App. 6a.

In 1982, petitioner was promoted and transferred to San Antonio, Texas. In October 1982, petitioner—anticipating additional deductions from increased business expenses and interest expenses on a mortgage on a new home—filed a new Form W-4 claiming 14 exemptions. Subsequently, petitioner filed a Form W-4 claiming 35 exemptions. On March 17, 1983, he filed a third Form W-4, claiming 50 exemptions. In a note included with the last form, he advised the GARCO accounting office: "I'm going to have to increase my exemption to 50 for a few months. I've got to survive the tax bite until my o/w build up." The "o/w" referred to "overwrites," the payments petitioner received based on insurance policies written by his agents. Pet. 5; Pet. App. 6a.

Acting on the W-4 Forms, GARCO withheld only negligible amounts from petitioner's compensation for 1983, 1984, and 1985. The amounts withheld ranged from slightly more than $1200 on compensation of more than $61,000 to $5455 on compensation of more than $74,600. Pet. App. 6a.

2. At the close of the government's case, petitioner moved for a judgment of acquittal on Counts 2 and 3. He argued that those counts did not charge a violation of 26 U.S.C. 7201 because neither alleged an affirmative act of attempted evasion as required by *Spies* v. *United*

States, 317 U.S. 492 (1943). Pet. 5. The government argued that both counts alleged the affirmative act of "maintaining of record with his employer his claim on Form W-4 of 50 exemptions." *Ibid.* The district court denied petitioner's motion. *Id.* at 6. In addition, the court instructed the jury that the government must prove "that the Defendant made an affirmative attempt to evade or defeat an income tax." 6 Tr. 52. The jury found petitioner guilty on all counts of the indictment, and the court denied petitioner's post-trial motion for acquittal based on the indictment's asserted failure to charge an affirmative act. Pet. 6–7.

3. The court of appeals affirmed. Petitioner renewed his contention that his convictions on Counts 2 and 3 should be reversed because the indictment did not allege an affirmative act of attempted evasion. Pet. App. 7a. In light of petitioner's concession that filing the fraudulent Form W-4 claiming 50 deductions on March 17, 1983, was an affirmative act for that tax year, the court of appeals dismissed as "semantic legerdemain" his argument that maintaining the fraudulent form in effect for the 1984 and 1985 tax years was only a non-felonious omission. *Id.* at 11a. The court reasoned that petitioner had an "obligation to correct his intentional misrepresentations" and that "[b]y maintaining the false form on file [petitioner] continued to perpetrate his initially-intended misrepresentations which were vitally relevant to the tax issue" and "thus constituted an act 'the likely effect of which was to mislead or conceal.' " *Id.* at 13a.

ARGUMENT

Petitioner contends that the indictment is defective because it did not charge an affirmative act of attempted tax evasion. Pet. 8 & n.6. His contention rests on *Spies* v. *United States*, 317 U.S. 492 (1943).

In *Spies*, this Court reversed a conviction for attempted tax evasion because the trial court had "refused a request to instruct the jury that an affirmative act was necessary to constitute a willful attempt."

317 U.S. at 494. The Court reasoned that Congress, by "employing the terminology of attempt" in the felony defined by 26 U.S.C. 7201, "intended some willful commission in addition to the willful omissions that make up the list of misdemeanors" in 26 U.S.C. 7203. 317 U.S. at 499. Noting that Congress had declined to "define or limit the methods by which a willful attempt to defeat and evade might be accomplished," the Court held that the requirement of an affirmative act is satisfied by any attempt "to evade tax in any manner or to defeat it by any means." *Ibid.* "By way of illustration, and not by way of limitation," the Court listed numerous types of conduct from which an "affirmative willful attempt may be inferred," including "any conduct, the likely effect of which would be to mislead or to conceal." *Ibid.* Applying that standard to the case before it, the Court reversed the taxpayer's conviction because of the defective jury instruction. At the same time, the Court stated that it "would consider conviction of a felony sustainable" on retrial based on the government's evidence showing, *inter alia*, that the taxpayer "kept inadequate and misleading records." *Id.* at 500.

The allegations in Counts 2 and 3 of the indictment in this case satisfied the requirements of *Spies*. Those counts alleged that petitioner willfully attempted to evade income tax by, *inter alia*, "maintaining of record with his employer his claim on Form W-4 of 50 exemptions." Pet. App. 3a. Contrary to petitioner's contention, Pet. 8, "maintaining" a fraudulent form on file with one's employer is not necessarily the product of inaction. Since an employee can take affirmative acts to cause his employer to maintain a false Form W-4 in effect, the indictment plainly did not rest its charge of attempted tax evasion on a passive omission.[1]

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[1] Petitioner does not claim in this Court that the evidence was insufficient to establish an affirmative act constituting an attempt to evade income taxes. The district court instructed the jury that the government must prove "that the Defendant made an affirmative attempt to evade or defeat an income tax." 6 Tr.

Petitioner contends that if the indictment against him is sufficient, an employee who willfully fails to amend an initially correct Form W-4 in response to changed circumstances could be charged with attempted tax evasion. Pet. 10. The court of appeals' decision would not permit that result, however, because it requires submission of a Form W-4 that is false at the time of filing, and maintenance of that form on file. Thus, in rejecting petitioner's challenge to the indictment, the court stated that petitioner "was under a continuing obligation to correct his intentional misrepresentations" and that he "continued to perpetrate his initially-intended misrepresentations." Pet. App. 13a. The court did not suggest that failure to correct a Form W-4 that was not initially intended to mislead would constitute an affirmative act of evasion.[2]

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52. The evidence introduced by the government at trial was sufficient for the jury to conclude that petitioner's maintenance of the false Form W-4 on file constituted an affirmative act of attempted evasion, for two reasons. First, petitioner willfully filed the false Form W-4 in 1983 with the result that insufficient tax was withheld from his compensation in 1984 and 1985. Second, petitioner engaged in affirmative acts to maintain the false Form W-4 in effect after 1983 by, for example, lying to an internal revenue agent. Gov't C.A. Br. 12–13; 4 Tr. 101, 103.

The court of appeals was entirely correct in concluding that "[b]y maintaining the false form on file [petitioner] continued to perpetrate his initially-intended misrepresentations." Pet. App. 13a. Petitioner's maintaining the false Form W-4 on file was tantamount to communicating to his employer that he was entitled to 50 exemptions during 1984 and 1985 and that it was appropriate to continue withholding from his compensation at the same rate. The effect of petitioner's conduct was to mislead the government about his tax liability.

[2] The court of appeals further observed that a taxpayer could not be convicted of attempting to evade tax in the absence of a specific intent to evade. Pet. App. 8a. In practice, a taxpayer's failure to amend an initially correct Form W-4 could not be charged as tax evasion unless the government had evidence that the taxpayer intended to evade his taxes through what was, in substance, a false representation.

Finally, contrary to petitioner's contention, Pet. 10, the court of appeals' rationale would not sustain a felony conviction for attempted tax evasion based on the intentional failure to file a tax return or to pay a tax. The court of appeals expressly acknowledged the *Spies* distinction between the felony of attempted evasion of tax, which involves conduct the likely effect of which is to conceal or mislead, and the misdemeanor of failure to file a tax return, which does not require proof of that element. Pet. App. 8a–9a. The court's decision turns on conduct that amounted to reassertion of false representations that petitioner was entitled to a certain number of exemptions and that he anticipated having a tax liability of an amount approximately equivalent to the amount withheld. Thus, in accord with *Spies*, the decision required more than a mere passive failure to file a return or pay taxes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

In this case, the Fifth Circuit held that since Petitioner was under a legal duty to correct a Form W-4 on file with his employer, his failure to correct or amend that form constituted an affirmative act elevating his misdemeanor failure to file to a felony attempted evasion of tax. (Pet. App. 13a.) The United States in its Brief completely abandons and ignores the Fifth Circuit's reasoning, thereby tacitly conceding that the appellate court's rationale is erroneous and contrary to this Court's holding in *Spies v. United States*, 317 U.S. 492 (1943).

Instead, the Government seeks to support the judgment below on the basis of a different argument, never previously advanced in this case. As the Fifth Circuit recognized (Pet. App. 12a), once a Form W–4 is filed with an employer there is nothing whatsoever the employee normally must do to maintain that W–4 on file; it remains effective unless and until amended or withdrawn. The United States, however, now contends that although "maintaining" a Form W–4 with an employer normally would not involve any affirmative acts, "an employee *can* take affirmative acts to cause his employer to maintain a false Form W–4 in effect." (Br. 4, emphasis supplied.) While it is possible that, under unusual circumstances, an employee could, by some affirmative act, attempt to maintain a W–4 on file,[1] the Petitioner, the prosecutor (4 Tr. 102–103; 5 Tr. 17–18; Doc. 41 at 4), and the Fifth Circuit (Pet. App. 13a), here all understood "maintaining on file" in its normal context to refer simply to Williams' failure to withdraw or amend that form. Indeed, the Government expressly told the jury that Williams was under a legal duty to amend or withdraw the Form W–4 on file, that he did not so, and that his failure to do so was an affirmative act. (5 Tr. 17–18.) Having thus caused the jury to understand that Williams' failure to correct the Form W–4 on file is an affirmative act, the Government cannot now justify the conviction based on a new and unlikely interpretation of the indictment.

---

[1] For example, if any employer were to ask an employee whether his Form W–4 should remain on file, the employee's affirmative answer presumably could be such an act. No such act occurred here.

But even if the Government had clearly charged Williams with "maintaining [the form] on file" through some affirmative act, that would still not justify his conviction, since the Government entirely failed to prove any affirmative act committed by Williams to maintain the Form W–4 on file. The "acts" suggested by the Government in a footnote (Br. 4–5 n. 1) plainly are irrelevant--filing the Form W–4 initially is a prerequisite and plainly cannot be an act *maintaining* that form on file,[2] and Williams' alleged lie to an IRS agent years after the fact likewise had nothing whatsoever to do with maintaining that form on file with his employer.[3] Under *Spies, supra*, a conviction cannot be sustained where the Government does not prove an affirmative act.

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[2] Despite the fact that it is blackletter law that Counts II and III must stand on their own as if Count I was not included in the indictment, (Pet. Br. 8), the Government improperly seeks to rely on Count I, which refers to the *filing* of a false Form W–4, to sustain the other counts. (Gov. Br. 3.) Similarly, the Government discusses Counts II and III as if they charged that Williams "maintain[ed] a *false* Form W–4 in effect" (Gov. Br. 4), when in fact only Count I charged that the form was false. (See Pet. Br. 8 n.7.)

[3] Furthermore, as the court of appeals below noted, "We do not consider whether Williams' subsequent false statements to the revenue agent constituted affirmative acts; *no mention of such statements was contained in the indictment*." (Pet. App. 15a n. 7, emphasis supplied.)

CONCLUSION

Since the Government has in effect conceded that the Fifth Circuit's rationale conflicts with *Spies* and has failed to advance any alternative rationale justifying the judgment below, summary reversal may be appropriate.

Respectfully submitted,

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July 1991